Office of Chief Counsel
Internal Revenue Service
memorandum
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date: June 9, 2009

to: Carolyn H. Gray, Deputy Director
Office of Professional Responsibility

from: Brinton T. Warren
Senior Technician Reviewer
(Procedure & Administration)

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subject: Request for Advice Regarding Practitioner's FOIA Request for Misconduct Reports on Which OPR Has Taken No Action

On April 16, 2009, the Office of Professional Responsibility ("OPR") requested the opinion of Associate Chief Counsel (Procedure & Administration) on the following questions:

1. Does a tax practitioner have a right of access, under the Freedom of Information Act ("FOIA"), to reports alleging misconduct ("misconduct reports") when OPR has taken no disciplinary action with respect to such reports?
2. What factors should OPR consider when determining whether to withhold such reports?

Background

On February 13, 2009, OPR received a FOIA request from CPA [redacted] requesting records from an OPR disciplinary case file concerning [redacted].

In late [redacted], a former client of [redacted] sent correspondence to OPR alleging misconduct on [redacted] part. Over the next [redacted] years, the former client sent OPR additional correspondence alleging misconduct by [redacted]. Typically, OPR was merely one of numerous addressees of these correspondences, including the Federal Bureau of Investigation, local sheriffs' offices, and other IRS offices. Any accusations of misconduct were fairly generalized. OPR received approximately [redacted] pages of correspondence from [redacted] former client. OPR concluded that no violations of Treasury Department Circular No. 230 had been substantiated against [redacted]. In [redacted], OPR closed the case without ever contacting [redacted].

[redacted] made his FOIA request after becoming aware of the correspondence his former client had sent to OPR. OPR has identified approximately 200 pages of records that are responsive to [redacted] FOIA request. Per a recent telephone conference, [redacted]

[redacted] has narrowed his FOIA request to only the cover letters, and not the attachments, of the former client's correspondence referring to [redacted].

Discussion

FOIA analysis should take place on a case-by-case basis. The statements and general analysis of this memorandum should be relied on in conjunction with an individualized analysis of each FOIA request and agency record.

The below analysis applies to misconduct reports that, at the time of the FOIA request, OPR had determination to take "no action," i.e. not to institute disciplinary proceedings, against the tax practitioner at issue.[1] This fact is determinative of the below FOIA exemption analysis. This memorandum suggests factual situations and topics OPR should consideration when responding to such a FOIA request. A different analysis would result if the misconduct report had resulted in the institution of OPR disciplinary proceedings.

I. Internal Revenue Service's Office of Professional Responsibility

OPR establishes and enforces consistent standards of competence, integrity and conduct for tax professionals and other individuals covered by Treasury Department Circular No. 230 ("Circular 230"). Circular 230 contains rules governing the recognition of attorneys, CPAs, enrolled agents, and other persons representing taxpayers before the IRS.

The "misconduct reports" at issue in this memo are defined at Circular 230 § 10.53. Misconduct reports are submitted to OPR in one of two manners. If an officer or employee of the IRS has reason to believe a tax practitioner has violated any provision of Circular 230, said officer or employee must notify OPR. The officer or employee must provide a written report to OPR explaining the facts and reasons upon which the suspected violation rests. Circular 230 § 10.53(a). Any person, other than an officer or employee of the IRS, may make an oral or written report of a suspected violation of Circular 230 to either OPR or any officer or employee of the IRS. Circular 230 § 10.53(b).

II. Freedom of Information Act

FOIA applies to records held only by executive branch administrative agencies and independent regulatory agencies of the federal government. All agency records in the possession and control of these entities must be released upon request unless the information falls within one of nine specified exemptions or two special law enforcement

[1] Your office has described that a determination of "no action" by OPR does not necessarily mean that the misconduct report did not substantiate sanctionable conduct under Circular 230. A "no action" determination simply means, procedurally, OPR will not begin disciplinary proceedings.

exclusions (rarely applicable to the IRS). See 5 U.S.C. § 552(b) and (c). Congress did not intend, however, for agencies to use certain exemptions to justify automatic withholding of information. S. Rep. No. 93-854 (1974). These exemptions are generally known as discretionary exemptions and are intended to designate those areas in which, under certain circumstances, information may be withheld. Records must be disclosed when there is no compelling reason for withholding. Id.

FOIA requires that "any reasonably segregable portion of a record" must be released after appropriate application of exemptions. 5 U.S.C. § 552(b). Therefore an agency should only redact exempted portions of records, whether the portions be single words, phrases, sentences, or entire paragraphs. The remaining nonexempt portions of a record should be released to the requester. If, however, an agency determines that nonexempt material is so "inextricably intertwined" that disclosure of it would "leave only essentially meaningless words and phrases," then the entire record may be withheld. Neufeld v. IRS, 646 F.2d 661, 663 (D.C. Cir. 1981).

Since OPR exists within an executive branch agency (the IRS), an OPR record should be release pursuant to a FOIA request. An OPR record, or certain information within the record, must fall within a FOIA exemption to prevent disclosure to a requester. Because FOIA creates a presumption favoring disclosure, the burden is on the agency to justify withholding requested material. 5 U.S.C. § 552(a)(4)(B).

III. FOIA Exemption 7

The subparts of FOIA Exemption 7 could provide justification to withhold information in OPR misconduct reports.

Exemption 7 provides that an agency need not make available:

> [R]ecords or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
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> (A) could reasonably be expected to interfere with enforcement proceedings,
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> (B) would deprive a person of a right to a fair trial or an impartial adjudication,
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> (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy,
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> (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source,
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> (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement

> investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law, or
>
> (F) could reasonably be expected to endanger the life or physical safety of any individual….

5 U.S.C. § 552(b)(7).

The law enforcement purposes protected by Exemption 7 include both civil and criminal purposes. See H.R. Rep. No. 1497 (1966); Rural Housing Alliance v. U.S. Dept. of Agriculture, 498 F.2d 73, 81 n.46 (D.C. Cir. 1973) ("This exemption covers investigatory files related to enforcement of all kinds of laws…."); Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir. 1974). Exemption 7 also applies to administrative enforcement proceedings. Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370, 373 (D.C. Cir. 1974) (an administrative determination of ineligibility of a governmental benefit has the "salient characteristics of 'law enforcement' contemplated by the wording of Exemption 7") [hereinafter Weinberger]. OPR practitioner disciplinary proceedings are considered administrative proceedings. See Washburn v. Shapiro, 409 F.Supp. 3, 7 (S.D. Fla. 1976) (upholding the disbarment of an account, to practice before the IRS, through "administrative proceeding[s]"). Cf. Hubbard v. US, 496 F.Supp.2d 194, 197 (D.C. Cir. 2007) (referring to the "administrative" complaint and proceedings to disbar a CPA from representing clients before the IRS).

It is not necessary that an adjudication be imminent or likely for an agency file to be deemed as having been complied for law enforcement purposes. Weinberger, 502 F.2d at 373; see Ditlow, 494 F.2d at 1074 (Exemption 7 is applicable to records collected in connection with an enforcement proceeding that was merely conceivable). "Likelihood of adjudication is not the decisive determinant of whether a file has been compiled for law enforcement purposes." Wienberger, F.2d at 373. OPR might, after initial investigation, take "no action" upon a misconduct report. However, upon the receipt of a misconduct report, it is "conceivable" that an OPR adjudication will take place. Therefore the receipt of a misconduct report classifies it as being compiled for law enforcement purposes.

Exemptions 7(A) and 7(B)

Exemption 7(A) provides that law enforcement records or information may be withheld if release could "reasonably be expected to interfere with enforcement proceedings." Exemption 7(A) requires an agency to demonstrate a law enforcement proceeding is pending or prospective. Manna v. United States Dep't of Justice, 51 F.3d 1158, 1164 (3d Cir. 1995); Campbell v. Dep't of Health and Human Services, 682 F.2d 256, 259 (D.C. Cir. 1982) (stating that an agency must demonstrate interference with pending enforcement proceeding to invoke Exemption 7(A)).

Exemption 7(B) provides that law enforcement records or information may be withheld if release "would deprive a person of a right to a fair trial or an impartial adjudication."

Exemption 7(B) requires that a trial or adjudication be pending or truly imminent. Washington Post Co. v. United States Dep't of Justice, 863 F.2d 96, 102 (D.C. Cir. 1988). This exemption is aimed at preventing prejudicial publicity. Exemption 7(B) is rarely invoked and the application of Exemption 7(A) invariably protects the interests that Exemption 7(B) would protect.

As described in your memorandum to our office, at the time of the FOIA request, OPR had determined "no action" would be taken as a result of the misconduct report(s). Exemptions 7(A) and 7(B) could probably not be asserted over the misconduct report. The key factor in both of these exemptions is the anticipation or existence of a proceeding. In regards to these misconduct reports, OPR has determined to take "no action," therefore no disciplinary proceedings are planned. For the practitioner at issue, there is no anticipation or existence of proceedings, trials, or adjudications on the basis of the misconduct report.

Exemption 7(C)

Exemption 7(C) provides that law enforcement records or information may be withheld if release "could reasonably be expected to constitute an unwarranted invasion of personal privacy." Exemption 7(C) applies a balancing test between the privacy interests that would be compromised by disclosure and the public interest in release of the requested information. Davis v. Dep't of Justice, 968 F.2d 1276, 1281 (D.C. Cir. 1992); see also Sussman v. United States Marshals Service, 494 F.3d 1106, 1115 (D.C. Cir. 2007). Where a legitimate privacy interest is implicated, the requester must demonstrate (1) that the public interest sought to be advanced is a significant one, an interest more specific than having the information for its own sake, and (2) the information is likely to advance that interest. Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157, 172 (2004); see also Sussman, 494 F.2d at 1115.

There is case law that supports the "categorical withholding" of information that identifies third parties in law enforcement records will ordinarily be appropriate under Exemption 7(C). SafeCard Services v. Securities and Exchange Commission, 926 F.2d 1197, 1206 (D.C. Cir. 1991); Coolman v. IRS, No. 98-6149, 1999 WL 675319, at *5 (W.D. Mo. July 12, 1999) (finding categorical withholding of third-party information in law enforcement records to be proper). Exemption 7(C) has been regularly applied to withhold references to persons who are not targets of investigations and who were merely mentioned in law enforcement files. See Gabel v. IRS, 134 F.3d 377, 377 (9th Cir. 1998) (protecting third-party names in Department of Motor Vehicles computer print out in plaintiff's IRS file); Murphy v. IRS, 79 F.Supp.2d 1180, 1185 (D. Haw. 1999) (records which contained information on investigations of unrelated third party taxpayers fell under Exemption 7(C)).

The described misconduct report could contain information on the FOIA requester, the practitioner at issue in the misconduct report (if not the FOIA requester), and other third parties. The misconduct report could, and would most likely, contain the name of the

IRS employee or outside party that submitted the misconduct report under Circular 230 § 10.53.

It is reasonable to provide the FOIA requester with any personal information in the misconduct report that pertains to the requester.

Exemption 7(C) could allow OPR to withhold personal privacy information of third parties described in the misconduct reports. Although case law permits a "categorical withholding" of third-party information, OPR should still review information against the 7(C) balancing test described in Favish.

If the FOIA requester is not the tax practitioner at issue in the misconduct report, the personal information of the tax practitioner should be extended the same analysis and protections under Exemption 7(C) as any other third party. Simply because the tax practitioner is the subject of the misconduct report does not negate his or her personal privacy interests.

As for withholding the name, and other information, of the person who submitted the misconduct report, Exemption 7(C) analysis should be conducted. If it was an IRS officer or employee who submitted the misconduct report, the fact that the individual is a public servant does not negate their privacy interests. Nix v. United States, 572 F.2d 998, 1006 (4th Cir. 1978) ("One who serves his state or nation as a career public servant is not thereby stripped of every vestige of personal privacy, even with respect to the discharge of his official duties."); see Church of Scientology Int'l v. IRS, 995 F.2d 916, 920-21 (9th Cir. 1993) (ordering the district court to evaluate the public interest met in releasing handwriting of IRS employees). An agency can assert Exemption 7(C) f public identification of a public servant could "conceivably" open the employee to harassment and annoyance in the conduct of their official duties or private lives. Nix, 572 F.2d at 1006; see also Aldridge v. United States Comm'r of Internal Revenue, No. 7:00-CV-131, 2001 WL 196965, at *2) (plaintiff failed to prove a significant public interest to overcome the IRS's assertion of Exemption 7(C) in withholding IRS employees' social security numbers, homes addresses, phone numbers, and birthdates).

Exemption 7(D)

Exemption 7(D) provides that law enforcement records or information may be withheld if release could reasonably be expected to disclose the identity of a confidential source. In civil investigations, this exemption allows an agency to withhold identifying information of the confidential source, but not the information the confidential source provides. This exemption makes further provisions for the withholding of the actual information provided by a confidential source in a criminal investigation. "Confidential" means confidence or trust, rather than "secret." Keeny v. Federal Bureau of Investigation, 630 F.2d 114, 119 n.2 (2d Cir. 1980); Radowich v. United States Attorney, District of Maryland, 658 F.2d 957, 960 (4th Cir. 1981). It is "necessary to show that the

information was given under an express assurance of confidentiality or in circumstances where such an assurance could reasonably be inferred." Id. at 960; see also United States Dep't of Justice v. Landano, 508 U.S. 165, 172 (1993). A determination of "confidentiality" is based upon the source's expectations of confidentiality, not the agency's expectations. Id. at 172; Billington v. United States Dep't of Justice, 233 F.3d 581, 585 (D.C. Cir. 2000).

As described in Circular 230 § 10.53, misconduct reports are submitted to OPR by either an IRS officer or employee or a person outside the IRS. Section 10.53 does not contain an explicit, or implicit, statement that the person who submits a misconduct report is a confidential source. OPR and the source of a misconduct report would have to have a clear agreement to define the source as confidential. Further, an IRS officer or employee should work under the assumption that their identity as a government employee is public knowledge.[2] Because of these facts, we find it unlikely that the person who submitted a misconduct report would classify as a confidential source under Exemption 7(D).

Exemption 7(E)

Exemption 7(E) provides that law enforcement records or information may be withheld if release "would [1] disclose techniques and procedures for law enforcement investigations or prosecutions, or [2] would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law."

The first clause of Exemption 7(E) does not require particular determination of harm if the information were released. It is designed to provide "categorical" protection to the information so described. See, e.g., Judicial Watch, Inc. v. United States Dep't of Commerce, 337 F. Supp. 2d 146, 181 (D.D.C. 2004) (stating the first clause of Exemption 7(E) provides "categorical protection" for law enforcement techniques and procedures); Smith v. ATF, 977 F. Supp. 496, 501 (D.D.C. 1997) ("Exemption 7(E) provides categorical protection to information related to law enforcement techniques."). Although Exemption 7(E)'s scope is broad, the technique or procedure at issue ordinarily must not be well known to the public. See Becker v. IRS, 34 F.3d 398, 405 (7th Cir. 1994) (concluding that the "investigative techniques used by the IRS with respect to tax protesters…unquestionably fall under [Exemption 7(E)]," and implicitly upholding the lower court's finding that the techniques at hand were not publically known); Campbell v. United States Dep't of Justice, No. 89-3016, slip op. at 6-7 (D.D.C. Aug. 6, 1997) (stating that Exemption 7(E) applies to "obscure or secret techniques," and refusing to apply it to "basic" techniques). However, courts have recognized withholding descriptions of publically known procedures when release would reduce the

[2] However there can be exceptions. See Kuzma v. IRS, 775 F.2d 66, 70 (2d Cir. 1985) (finding that Exemption 7(D) can protect identities of some federal government employees who served as confidential sources).

effectiveness of the procedure. See Cal-Trim v. IRS, No. 05-2408, slip op. at 6-8 (D. Ariz. Feb. 6, 2007) (protecting records in ongoing IRS investigation when release would allow the individuals under investigation to devise explanation or defenses based on IRS analysis or allow the individuals to hide the transactions being investigated).

The second clause of Exemption 7(E) has a distinct harm standard, where an agency must demonstrate that release of information would pose a particular harm to law enforcement efforts. See Carp v. IRS, No. 00-5992, 2002 WL 373448, at *6 (D.N.J. Jan 28, 2002) (concluding disclosure "would risk circumvention of the law by exposing specific, non-routine investigative techniques used by the IRS to uncover tax fraud"); Tax Analysts v. IRS, 152 F. Supp. 2d 1, 17 (D.D.C. 2001) (concluding that disclosure of an agency summary of tax-avoidance scheme, "including identification of vulnerabilities" in IRS operations, could risk circumvention of law), aff'd in part, rev'd in part, 294 F.3d 71 (2002). This determination can be made at any time from the basic investigative state of a law enforcement matter or to a prosecution.

Application of Exemption 7(E) would be very specific to the contents of a particular misconduct report. We can make little general analysis of how Exemption 7(E) would apply to a misconduct report without studying the specific misconduct report. Factors such as who submitted the misconduct report (IRS employee or outside party), the scope of allegations in the report, the scope of substantive facts in the report, and the tax practitioner at issue would be some items to consider when applying Exemption 7(E). If law enforcement techniques and procedures are contained in published guidance, such as Circular 230, OPR would have to provide particular justification to withhold such procedures under Exemption 7(E). See Campbell. Further, the fact that a misconduct report resulted in "no action" might create a presumption that the report does not contain information that would harm law enforcement efforts. Although a determination of "no action" does not signify a misconduct report does not contain descriptions of sanctionable conduct, it is a factor to consider in applying Exemption 7(E).

Exemption 7(F)

Exemption 7(F) provides that law enforcement records or information may be withheld if release "could reasonably be expected to endanger the life or physical safety of any individual." This exemption broadly encompasses any unspecified individual whose safety could reasonably be endangered by a disclosure. Exemption 7(F) requires no balancing test between the public's need for information and an individual's personal safety; an individual's personal safety always outweighs disclosure.

Given the facts of the [redacted] FOIA request, personal safety does not appear to be a concern. Therefore this memorandum will not analyze exemption 7(F) further than the statutory rule. But Exemption 7(F) is available to OPR when it believes the release of information could put the personal safety of an individual at risk.

Conclusion

With deference to a case-by-case analysis, we conclude that:

(1) The [redacted] misconduct reports do not, in their entirety, fall under a FOIA withholding exemption;

(2) The [redacted] misconduct reports should be provided to [redacted] per his FOIA request; and

(3) Particular items in the [redacted] misconduct reports, such as third-party tax identification numbers and personal information of third parties, may be withheld from release (i.e. redacted) to [redacted] under FOIA Exemption 7.

Contact Information

We are happy to further assist OPR on this or any other related matters. Please contact either Mary I. Slonina or Brinton Warren at (202) 622-7950.